

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,	:	
	:	Criminal Case
Plaintiff	:	No. 20-CR-00143-TSE
	:	
v.	:	
	:	
ZACKARY ELLIS SANDERS,	:	October 15, 2021
	:	11:25 a.m.
Defendant	:	
.....	:

TRANSCRIPT OF PRETRIAL CONFERENCE
BEFORE THE HONORABLE T.S. ELLIS, III
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

P R O C E E D I N G S

COURTROOM CLERK: Court calls criminal case United States of America versus Zackary Ellis Sanders, Case Number 2020-CR-143. May I have appearances, please, first for the Government.

MR. SCHLESSINGER: Good morning, Your Honor. Seth Schlessinger, Bill Clayman, and Jay Prabhu for the United States.

THE COURT: Good morning to you all. And who is here for the defendant?

MS. GINSBERG: Good morning, Your Honor. Nina Ginsberg, Jonathan Jeffress, and Jade Chong-Smith for Mr. Sanders. And also present is Louis Sirkin, whose motion for *pro hac vice* is still pending before this court.

THE COURT: Yes. I will of course sign that *pro hac*. And there is no limit, in my view, on the number of lawyers who can represent a defendant. However, there are limits on who can appear and where.

First, only one lawyer will be able to address the Court on any particular argument, only one lawyer will examine a witness or object to questions asked of that witness. One lawyer, not several. But I don't care if you want to switch it around. But you're going to have to have social distancing at the seats as well, so you can't all sit there during the trial.

MS. GINSBERG: Judge, maybe I can be a little helpful.

1 Mr. Mahoney, who has previously been admitted, will not be
2 present at trial. He was admitted for the purpose of the autism
3 evidence. The Court has excluded that evidence, so it's not
4 necessary for him to be here.

5 THE COURT: But my point is, Ms. Ginsberg, it's fine
6 for you to have as many lawyers all over the country if you
7 want. I don't care about that. But you can't all participate.
8 In other words, I'm not going to have more than one lawyer for
9 each witness and more than one lawyer for each argument.

10 MS. GINSBERG: I understand that. We were hoping to
11 get some assistance from the Court. The Government has
12 identified three agents or forensic experts to -- what appears
13 to be, to introduce evidence regarding the six victims. They
14 have not indicated which agent is going to introduce evidence
15 with respect to -- it's got to be at least four of the victims.
16 Two are on the Government's witness list and will be present.

17 The volume of material is so large, we have divided
18 amongst the lawyers primary responsibility for each individual
19 victim. We don't know - and the Government has not answered any
20 of my emails requesting this information - which agent is going
21 to testify about which victim. So we are essentially unable to
22 prepare for one lawyer to examine or cross-examine one witness
23 because we don't know which --

24 THE COURT: They're not bound to do that, though.

25 MS. GINSBERG: Judge, what we're saying is, the volume

1 of material with regard to the victims is so voluminous that no
2 one lawyer representing Mr. Sanders is able to prepare to
3 cross-examine with respect to each victim. It would be
4 different if the victims were coming to court. We have divided
5 the two that are coming to court. We've divided those up. But
6 if the Government --

7 THE COURT: And you've listed four.

8 MS. GINSBERG: No, the Government has.

9 THE COURT: Did you list any victims?

10 MS. GINSBERG: We are not calling any victims,
11 Your Honor.

12 THE COURT: All right. They were listed.

13 MS. GINSBERG: They were previously listed, but they've
14 been removed.

15 THE COURT: All right. So you're not calling any. The
16 Government has listed two.

17 MS. GINSBERG: They've listed two, but there are six
18 victims. And they are going to introduce evidence -- as it
19 appears from their exhibit list and their witness list, they are
20 going to introduce evidence about the remaining four, who will
21 not be present in the courtroom, through three different agents.

22 THE COURT: I understand your request. I'm not
23 inclined to get into the business of requiring one party or
24 another to tell me exactly what their scope of their examination
25 is going to be. But let me think about that.

1 Let me go on. I have an agenda that I want to get
2 done.

3 MS. GINSBERG: I understand, Your Honor.

4 THE COURT: And at the end, Ms. Ginsberg, I will say,
5 is there anything else you want to raise, and renew that request
6 at that time and I'll think about it.

7 MS. GINSBERG: Thank you, Your Honor.

8 THE COURT: All right. I have covered the fact that
9 I've made clear that I have no problem or objection to however
10 many lawyers want to appear *pro hac* for the defendant.
11 However -- and that gives them access to the docket. However,
12 if the clerk is directed by me to contact the defendant about
13 something, it's going to be you, Ms. Ginsberg. And I do that
14 because you're the person with the most experience in this
15 courthouse, and you're the person who lives closest. You're not
16 in Buffalo, Chicago, or wherever. And if we need something, to
17 communicate something, then I don't want Ms. Randall to have to
18 go doing things.

19 MS. GINSBERG: I'm very happy to do that, Your Honor.

20 THE COURT: Yes, I'm glad. Because I am going to do it
21 that way.

22 MS. GINSBERG: I'm sure you are.

23 THE COURT: All right. Now, I'm going to review with
24 you the voir dire process. I know Ms. Ginsberg may be familiar
25 with it from recent times. Have you had a case in this

1 courtroom recently?

2 MS. GINSBERG: I had a case in front of Judge Alston in
3 the courtroom, but not in front of Your Honor.

4 THE COURT: Was what the MS-13 matter?

5 MS. GINSBERG: No, Your Honor, that was another
6 child pornography case several weeks ago.

7 THE COURT: Oh, all right. I do recall he asked to use
8 this courtroom.

9 All right. So let me review the process with you. For
10 the time being, although the pandemic is winding down, we still
11 adhere to the rules of social distancing and masking. When
12 you're otherwise than behind these partitions, then it's not
13 required. Otherwise, it is required.

14 Now, we will do the voir dire -- I'm going to go
15 through the whole process with you. We will do the voir dire
16 beginning Tuesday at 9 o'clock. Not beginning Tuesday at 9:30,
17 but at 9:00. And at that time we're going to have the voir dire
18 proceed in two phases, a morning phase and an afternoon phase.
19 And we do that because we can't fit all of the prospective
20 jurors in this courtroom with social distancing. It's the
21 largest courtroom, and I have been trying cases for 34 years
22 here. Not in this courthouse. This courthouse hasn't been here
23 34 years, or this courtroom. For many years I've been in this
24 courtroom and we're able to accommodate large numbers of people
25 for voir dire in this courtroom. But we can't do it during the

1 pandemic because of social distancing requirements.

2 So we'll proceed at 9 o'clock and again at 1 o'clock.
3 I think I can complete the voir dire in that period of time. At
4 least cases I've had in the last two weeks demonstrate that I
5 can do that.

6 Now, next, I will conduct the voir dire. I will ask
7 all the questions. And I think, Mr. Schlessinger, you were here
8 for the last pornography case that I tried here to a jury.

9 MR. SCHLESSINGER: Yes, Your Honor, I was here as
10 recently as Tuesday.

11 THE COURT: All right. Now, I will conduct all the
12 voir dire. I have reviewed your submissions and I will take
13 that into account. However, I will do all the voir dire, and
14 I'm going to go into some detail now about how that will be done
15 mechanically. But let me say that at the end of the voir dire,
16 I will ask you whether you have any further voir dire you want
17 me to conduct, and you can then look at what you've submitted
18 and tell me what you think you want to know.

19 I will tell you now that unlike other courts in other
20 jurisdictions -- and I have tried cases in North Carolina, the
21 Eastern District of New York, and other places, where they do
22 things very differently. Indeed, I remember one matter in the
23 Eastern District of New York where the judge did not even want
24 to be present during voir dire, and another one where the judge,
25 who has now passed away - he's a famous person - he never did

1 come in in a robe. Shirt sleeves and a jacket was the most.

2 Well, it's a big country and there's a wide variety of
3 people who inhabit this earth, and Ms. Ginsberg will tell you
4 what variety of people inhabit this courtroom. I will do all
5 the voir dire.

6 Now, at the end of my voir dire I'll ask you if you
7 have any more, and at that point I will rule on anything that
8 you want to persist in asking for.

9 Now, there will be about 45 people in the courtroom
10 seated at social distances. And, of course, you'll be here,
11 won't you, Ms. Ginsberg?

12 MS. GINSBERG: Oh, absolutely.

13 THE COURT: There was speculation whether you would be
14 here this morning.

15 MS. GINSBERG: There was?

16 THE COURT: There was.

17 MS. GINSBERG: I maybe shouldn't ask why.

18 THE COURT: No, you shouldn't.

19 MS. GINSBERG: I won't.

20 THE COURT: Anyway, the deputy clerk will call the
21 roll, so you'll have an opportunity to match a name with a face
22 when that person rises to indicate they're present. They'll be
23 administered an oath and I will begin asking questions.

24 Now, for most of the questions, at the beginning they
25 will indicate they have an affirmative answer. For example,

1 I'll ask them, have you previously served on a jury, a grand
2 jury or trial jury, on any state, federal, or local court, and
3 hands will go up. The deputy clerk -- I'm sorry, not deputy
4 clerk. The court security officer will take a microphone to
5 them, they will stand and they will answer the question with the
6 microphone. And there will be a number of questions like that
7 that I'll ask.

8 For example, I'll point out -- who's going to be the
9 main person here? You, Mr. Schlessinger?

10 MR. SCHLESSINGER: Your Honor, I think it will be
11 either me or Mr. Clayman.

12 THE COURT: All right. I'll ask whether they or any
13 member of their family, so far as they know, know these people
14 or know this person, or any attorneys or employees of the
15 U.S. Attorney's Office. And I'll do the same for each of the
16 firms involved. And if hands are raised, the court security
17 officer will take the microphone to them, they'll answer, and
18 I'll do any follow-up. That will cover a number of questions.

19 Then the second phase of the voir dire will be that
20 phase in which I ask questions that they will be permitted -- in
21 the usual case, before the pandemic, I would do it all at the
22 bench and they would give their answer in the relative privacy
23 of the bench and counsel to provide any personal information
24 they have to provide, and also to avoid having any knowledge or
25 information that might infect one juror from infecting them all.

1 And the way we'll do that is a little different. The
2 questions -- I will ask the questions in a series of three, so
3 it won't be evident to anybody which question they have an
4 affirmative answer to. If they do have an affirmative answer,
5 they'll be asked to come up, they'll take a seat in the witness
6 box - you can't see it clearly, there is a screen there - and
7 they will give their answers there wearing earphones and a
8 microphone. And that will be heard only by counsel, the
9 defendant, and me, and the bench. It won't be heard. We also
10 have a noise machine here that we will activate so they won't
11 hear it. And I'll also be reminding lawyers and the prospective
12 jurors to speak quietly into the microphone.

13 Now, then we will go through all of that voir dire. At
14 the end of what voir dire, as I've told you, I will then ask you
15 if you have any further voir dire and I'll rule. And I think
16 you can reasonably -- Ms. Ginsberg can reasonably anticipate
17 what those rulings will be. I don't know whether you've read
18 some of the voir dire submitted by your colleagues,
19 Ms. Ginsberg, but you've had experience and know, I'm interested
20 in picking jurors who can render a fair and impartial verdict.
21 I'm not interested, as you would be -- and I understand your
22 interest. You want to pick jurors who would be more favorable
23 to your clients. That's your goal. It isn't the Court's goal.
24 I want impartial jurors, that's all.

25 So you don't get to know who voted for Trump, who voted

1 for Clinton, anything like that, what magazines do you subscribe
2 to. And I say this jokingly, because there are places where
3 that's done. I even have a dear friend who is no longer in this
4 veil of tears who was a federal judge in Arizona, and he always
5 let jurors ask questions, and he tried to persuade me to do the
6 same thing. He was a very persuasive man, he was a delightful
7 person. I liked him very much, although we had views very, very
8 different. So anyway, I did what he suggested, and I only did
9 it once. The result was horrendous.

10 Anyway, that's how we will do the voir dire. At the
11 end I'll ask you if you have any further voir dire; I'll rule on
12 it then. Then I'll ask you if you have any motions to strike
13 for cause, and I'll rule on those. That will be the morning.

14 Then these 45 people will go to lunch and be told to
15 come back at 2 o'clock or thereabouts, or 3 o'clock we told them
16 last time. They'll come back at 3:00 because that will give me
17 a chance to do the second 45 and get them on down the road. And
18 after that's done, we hope, in the first day, to have picked a
19 jury.

20 Now, I will seat -- how long do you think your
21 case-in-chief will take, Mr. Schlessinger?

22 MR. SCHLESSINGER: Your Honor, I estimate probably the
23 balance of next week. That is, until Friday, I would estimate.

24 THE COURT: Really? All right. That surprises me.
25 But then I was surprised at how long this last case you were in

1 took.

2 MR. SCHLESSINGER: Yes, Your Honor. I think it's
3 similar, maybe a little shorter, maybe only two full days of
4 evidence, which would have us rest on Thursday. But I would
5 estimate, best estimate, resting sometime on Friday.

6 THE COURT: All right. Usually I hear other matters on
7 Friday, but next week I will hear this case.

8 All right. So I will seat, then, 14 jurors, two
9 alternates. That means the Government will have seven strikes
10 and the defendant will have 11. You get one extra strike for
11 every two jurors. And, of course, unlike a civil case, the
12 alternates will be identified and the order in which they were
13 named or called will be identified.

14 Now, Ms. Ginsberg, in the event that you are not here
15 or not the person who is doing this, here's what happens after
16 the motions to strike are ruled on and we are left with a panel
17 of eligible jurors. We have a board, and the deputy clerk,
18 Ms. Randall, will call names at random. She'll call 12 names
19 and they'll come up. And you can't see it, but there are social
20 distancing places here in the jury box where they may sit. And
21 you'll know because we'll do it out loud, "Mr. Smith,
22 Ms. Jones," and they'll come up and sit and you'll know the
23 order.

24 Then they'll be listed here. There will be a little
25 piece of paper that's attached to this. This will be taken

1 first to the Government; the Government will exercise its
2 strikes. Now, you may exercise as many strikes as you wish on a
3 round, but you may not back-strike. In other words, a juror who
4 survives a round cannot be stricken later on.

5 So if the Government strikes two people and the
6 defendant strikes three people, then those people will be told
7 to return to their seat in the courtroom, and then the deputy
8 clerk will call out five new persons to come and sit in
9 the...and when you exercise strikes, be sure to number them as
10 you do. This will ensure that you don't think you have more
11 strikes than you have, and it will also enable the deputy clerk
12 and me to keep track of that.

13 So after 12 people are chosen, then Ms. Randall will
14 call two more names and those will be alternates. If you have
15 strikes left, you can exercise against those too. And
16 ultimately the two people who are chosen in addition to the 14
17 are the alternates, and they will serve, if necessary, in the
18 order in which they are selected. And we will know that because
19 of the way we do it.

20 So that is how the jury selection will go. Following
21 the jury selection, I will have preliminary instructions to the
22 jury. No substantive instructions, only procedural
23 instructions. Following that, there will be opening statements.

24 Who will make the opening statement?

25 MR. SCHLESSINGER: I will, Your Honor.

1 THE COURT: How long do you think you need for opening
2 statement?

3 MR. SCHLESSINGER: I request 10 or 15 minutes.

4 THE COURT: Ms. Ginsberg, who will do your opening
5 statement?

6 MS. GINSBERG: That has not yet been decided.

7 THE COURT: How long do you think whoever it is is
8 going to need?

9 MS. GINSBERG: Certainly not in excess of 15 minutes.

10 THE COURT: Good. Those are both reasonable. Okay.
11 And then we'll go to the witnesses. And as I said, it doesn't
12 matter to me how many lawyers want to divide up witnesses.
13 That's fine with me. That includes the Government. You don't
14 have to do all of them, Mr. Schlessinger and Mr. Clayman,
15 although -- is that Mr. Prabhu over there?

16 MR. PRABHU: It is, Your Honor.

17 THE COURT: Well, he's not going to take any witnesses,
18 I'm sure.

19 Then we will hear the evidence. I want to tell you
20 that we use a questionnaire for COVID. Every prospective juror
21 has filled out a questionnaire for COVID. And, Ms. Ginsberg,
22 you know about that, don't you?

23 MS. GINSBERG: Yes, sir.

24 THE COURT: And you know that jurors who answer "yes"
25 to questions 2 through 5 can't even come into the courthouse.

1 Either because they have it or they've been quarantined, or for
2 whatever reason, they can't come into the courthouse. I don't
3 think we preclude people from coming into the courthouse if they
4 haven't been vaccinated, but we do preclude people from coming
5 into the courthouse if they have been exposed to COVID or they
6 have the symptoms.

7 I've forgotten what the five questions are. I don't
8 think I have them here in front of me. Here they are. "Have
9 you been diagnosed with COVID-19?" If they answer "yes," they
10 can't come in the courthouse. "Have you been directed to
11 quarantine or isolate?" If they say "yes," they can't come in.
12 "Have you experienced a fever or chills, persistent cough,
13 shortness of breath or difficulty breathing, a new loss of taste
14 or smell, or other flu-like symptoms?" If the answer is "yes,"
15 they can't come in the courthouse. "Have you resided with or
16 been in close contact with any person in the above-mentioned
17 categories?" If they say "yes," they can't come in the
18 courthouse.

19 Now, I can tell you that 12 people answered "yes" to
20 that. So they can't in the courthouse, and I've excused them.
21 Any objection to that on behalf of the Government?

22 MR. SCHLESSINGER: No, Your Honor.

23 THE COURT: Any objection on behalf of the defendant?

24 MS. GINSBERG: No. Your Honor, I would reserve an
25 objection in the event that we end up having a jury that is not

1 a fair cross section of the community. But if that is not the
2 case --

3 THE COURT: The ones we've excused for this are all
4 white.

5 MS. GINSBERG: Oh, okay. I didn't know that.

6 THE COURT: Yes. And there is a fair cross section.
7 That's reviewed. A fair cross section of this area.

8 MS. GINSBERG: Yes, sir.

9 THE COURT: All right. Now, for objections, in this
10 courtroom, the way in which you assert an objection to a
11 question is you stand, say "objection," but no speeches then.
12 If I need to hear from you on argument, we will go to the
13 earphones and the microphone and the noise machine. In other
14 words, there will be no arguments by the Government or by the
15 defendant to the jury on objections.

16 In the years that I tried cases as a lawyer, I had
17 experiences where judges did not follow that, and the result was
18 what you might expect. That's another reason why I don't allow
19 lawyers to conduct voir dire. I too was subjected to that as a
20 lawyer, and -- at my age, I reminisce a lot. I remember going
21 into a court in the western part of Virginia to try a case in
22 which my client was a large automobile manufacturer - I won't
23 identify it - but the problem was that they had been in a pickup
24 in the mountains in West Virginia, turned over, and a gear shift
25 lever went through the brain of the driver. And I thought I had

1 a decent case. I was wrong. Because there had been five guys
2 in the front seat of this pickup truck; they had taken the gear
3 shift knob off the lever - wise - and they had had a lot of
4 beer.

5 So I thought, you know, this doesn't look that bad.
6 State case, state court. And then we began the voir dire, which
7 was lawyer-conducted voir dire. The plaintiff went first, and
8 the plaintiff, who was a very good plaintiff's lawyer from
9 Tennessee somewhere, he said, well, now, Ms. Ericson, you
10 wouldn't be prejudice against my client if he had had a few
11 beers before this, would you? Whoa, wait a minute, I said. The
12 judge said, never mind, son - I was young then - he says, you
13 can ask the question the other way around. Well, I got home
14 cooked pretty badly that morning.

15 And later on, to finish this story quickly -
16 Ms. Ginsberg will tell you that's one of the disadvantages of
17 appearing before me, is sharing my reminisces - I was on a
18 judicial conference committee for the canopy committee, the big
19 committee for the rules of practice and procedure which
20 considers the various advisory committee rules, and I sat on
21 that committee for about six years toward the end of the 1980's.
22 And there was a fellow who was appointed to this committee who
23 had been Bill Clinton's lawyer, and he was a big advocate for
24 lawyer-conducted voir dire, as any trial lawyer would be. You
25 want to do it because you want to persuade the jury in advance

1 that you are right. And he and I squared off for about a year
2 and a half, and the result is what you see today in the rules of
3 civil procedure. It's up to the judge, and I don't allow it.

4 MS. GINSBERG: Judge, before you go on beyond
5 objections, I would like just some instruction. If one of us
6 just stands up and objects and Your Honor makes a ruling, say,
7 denying my objection, how would you like us to be able to
8 preserve the basis for our objection for the record? Because it
9 will be deemed waived if we --

10 THE COURT: Remind me at the recess and I'll let you do
11 it in the absence of the jury.

12 MS. GINSBERG: Thank you.

13 THE COURT: But, you know...

14 MS. GINSBERG: That's why I asked. I understand the
15 Court's ruling, but I think we have to be able to preserve the
16 record. And I have had objections waived because I didn't make
17 them clear on the record.

18 THE COURT: Unless it's obvious. If it's obvious,
19 don't take my time.

20 MS. GINSBERG: Yes, Your Honor.

21 THE COURT: For example, if you got up and objected in
22 this case and I ruled on it because I've already ruled on
23 autism, don't get up and tell me what this doctor or that doctor
24 would have said about the Autism Spectrum Disorder.

25 MS. GINSBERG: That's not what I had in mind,

1 Your Honor.

2 THE COURT: Well, I want to be clear that I don't want
3 frivolous objections.

4 All right. And, of course, I'm not going to ask the
5 defendant at this time - that's not appropriate - whether they
6 intend to offer witnesses or evidence and what that will be.
7 I'll do that at the end of the Government's case. You have the
8 right not to have to disclose that until then.

9 You have given me a list of witnesses, but I want that
10 updated. Because I'm not requiring it, you're not required to
11 do it, but I want to safeguard against having a witness that you
12 call that all of a sudden Ms. Jones on the jury says, hey, I
13 know that person. So that has happened. Virtually everything
14 happens in 34 years.

15 So I ask that you give me a list of witnesses, but I
16 don't require it. You don't have to do that if you don't want
17 to. You have already submitted one, but I don't think it's
18 adequate anymore. Is that right, Ms. Ginsberg?

19 MS. GINSBERG: I think that's correct, Your Honor.

20 THE COURT: All right. So if you want to give me one -
21 and I hope you do, because I want to avoid the circumstance I
22 described to you - then I will get it from you on Tuesday
23 morning.

24 MS. GINSBERG: Yes, sir.

25 THE COURT: Now let me go to another matter. And I

1 will issue the *pro hac* form for the -- I don't recall what
2 law firm it was, whether it was New York or Chicago.

3 MS. GINSBERG: It's Cincinnati, Ohio. That is
4 Mr. Sirkin, seated next to me.

5 THE COURT: That's fine. That's fine. I will enter
6 that. I'm not a computer person, as you know, Ms. Ginsberg, so
7 I don't know what that entitles that person to. But they should
8 have it, and I will sign that.

9 MS. GINSBERG: Thank you.

10 THE COURT: Now, very recently the defendant has filed
11 a notice of a new expert, this one a BDSM so-called expert. And
12 the Government has filed a motion to exclude that testimony, and
13 something was filed today. I'll hear focused argument on that
14 now.

15 Who will argue that for your group?

16 MS. GINSBERG: Mr. Jeffress, Your Honor.

17 THE COURT: All right. I'll hear first from him. And
18 I understand what you've submitted, Mr. Jeffress, that you're
19 not going to elicit from him any questions relating to
20 mental health or autism or whatever. But I do know that you
21 want to elicit questions from him about BDSM.

22 MR. JEFFRESS: Yes, Your Honor. That's correct. In
23 response to Your Honor's ruling that we received the other day
24 on the autism evidence, we are not going to have Dr. Berlin
25 testify about Mr. Sanders' mental health condition with respect

1 to the autism or with respect to any other aspect of
2 Mr. Sanders' mental health. So I think many of the concerns
3 that the Government raised with respect to the 12.2 notice and
4 with respect to the law that, you know, limits our ability to
5 present a mental health defense are no longer relevant to
6 Dr. Berlin's testimony.

7 There were four opinions from Dr. Berlin's notice. I
8 think the one that we seek to present, Your Honor, after
9 Your Honor's ruling, and that is consistent with it, is just the
10 subject matter expertise on the BDSM issue. BDSM -- and it's
11 not really about opinion so much as it is providing the jury
12 with the context and with expert facts so that they will
13 understand --

14 THE COURT: What makes him an expert on that?

15 MR. JEFFRESS: Your Honor, Dr. Berlin, I don't think
16 the Government has seriously contested that he's one of the
17 foremost experts --

18 THE COURT: Well, I don't think anything in what you've
19 submitted that suggests he knows anything about BDSM.

20 MR. JEFFRESS: He runs the Johns Hopkins clinic on
21 sexual disorders. He's one of the most foremost experts on
22 sexual disorders and basically --

23 THE COURT: And BDSM is a sexual disorder?

24 MR. JEFFRESS: No, it's actually not, Your Honor.

25 THE COURT: Then what does that tell me?

1 MR. JEFFRESS: I think, Your Honor, we can certainly --

2 THE COURT: You tell me that Johns Hopkins has this
3 great thing for sexual disorders, and now you tell me that BDSM
4 is not even part of that.

5 MR. JEFFRESS: I would say that his knowledge on this
6 range is beyond just the disorders. He is one of the -- or he
7 used to be, at least, one of the people, the professionals who
8 decides what goes into the DSM. So we're on that level of
9 expertise.

10 But I don't think there's a serious objection to
11 Dr. Berlin not having a background and experience on many
12 different aspects of sexual behavior, including this one.

13 THE COURT: I, as you know, under 702, am the
14 gatekeeper.

15 MR. JEFFRESS: Yes, Your Honor.

16 THE COURT: So you've got to persuade me that he knows
17 what he's talking about. And what you've submitted doesn't.

18 MR. JEFFRESS: Well, Your Honor, we are happy to -- and
19 again, this isn't going to come up until the defense case, but
20 we are --

21 THE COURT: What opinion do you want to elicit from
22 him?

23 MR. JEFFRESS: Again, Your Honor, on this subject, on
24 the first category of his expert notice, I don't think we're
25 providing an opinion. I think it's more providing the jury with

1 expert facts so that they understand the evidence and they
2 understand the chat communications between Mr. Sanders and --

3 THE COURT: Well, that's expert testimony.

4 MR. JEFFRESS: It's expert testimony, but it's not
5 really an opinion. He's going to explain this area, explain how
6 the terminology works, explain what the dynamic is.

7 THE COURT: Why is that relevant?

8 MR. JEFFRESS: Well, I don't think there's any
9 question, and I think the Government would concede, that
10 Mr. Sanders met the alleged minor victims on BDSM websites, for
11 the most part.

12 THE COURT: Tell me again what BDSM is.

13 MR. JEFFRESS: Your Honor, I think the best way to
14 think about --

15 THE COURT: No, tell me what the letters stand for. I
16 know it's sadomasochism at the end, but what's the BD?

17 MR. JEFFRESS: I'm just trying to make sure I say this
18 right. I know the first one is bondage, discipline, and
19 sadomasochism are those letters.

20 THE COURT: Bondage, discipline, sadomasochism. All
21 right.

22 THE DEFENDANT: That is not correct. Bondage,
23 discipline, dominance, submission, sadomasochism.

24 MR. JEFFRESS: This is why we need Dr. Berlin, Judge.
25 He would know the answer.

1 THE COURT: I don't know of any discussion between the
2 defendant and the victims that use BDSM.

3 MR. JEFFRESS: Your Honor, the entire dynamic between
4 Mr. Sanders -- and I think the Government is not going to
5 seriously resist this --

6 THE COURT: Tell me what you want this person to
7 testify to.

8 MR. JEFFRESS: I want him to explain what this is to
9 the jury, explain what this dynamic is. There is no question --

10 THE COURT: And why is that relevant?

11 MR. JEFFRESS: Well, it is what they're doing in these
12 chats.

13 THE COURT: All right. But why is that relevant to the
14 offense charged?

15 MR. JEFFRESS: Well, Your Honor, in a couple of ways.
16 First of all, the best way to look at this is that when you come
17 into this --

18 THE COURT: Look, let me get to the heart of this
19 matter. You don't seem to see it -- the Government has to prove
20 that the defendant uses, persuades, induces, entices, or coerces
21 any minor to engage in, and so forth. So is what you're
22 offering this person for relevant to uses, induces, entices, or
23 coerces any minor?

24 MR. JEFFRESS: It's beyond that, Your Honor. First --
25 I think there are a couple of different aspects. First, he has

1 to explain what's going on here. The jury is not going to be
2 familiar with this subject area. This is classic expert
3 testimony in this respect.

4 THE COURT: A moment ago you were saying it wasn't
5 expert.

6 MR. JEFFRESS: No, he --

7 THE COURT: But anyway, what is the relevance of what
8 they have to say?

9 MR. JEFFRESS: The relevance of what Dr. Berlin has to
10 say?

11 THE COURT: Yes.

12 MR. JEFFRESS: Because he's explaining the dynamic that
13 these --

14 THE COURT: Never mind dynamic. What is it that he
15 wants to say? In other words, let's say you have the defendant
16 saying, look, take your clothes off and slap yourself around.
17 What is he going to testify about as to that?

18 MR. JEFFRESS: He's going to say that that is -- what
19 they are doing, they're engaged in a power-sharing relationship
20 where basically people like -- and this is a widespread sexual
21 practice and it's also a nonsexual practice.

22 THE COURT: It's not widespread.

23 MR. JEFFRESS: Well, Your Honor, it's much more
24 commonplace than people think, and that's why Doctor --

25 THE COURT: That may be. But it certainly isn't

1 widespread. I've lived nine centuries on this planet and I've
2 never run across it. Nine decades, not centuries.

3 MR. JEFFRESS: Well, Your Honor, among other people,
4 this is something that goes on. I don't even think the
5 Government is opposing it on this basis.

6 THE COURT: I am still the gatekeeper, and I will have
7 to decide this.

8 MR. JEFFRESS: So basically, Your Honor, he has to
9 explain the whole context so the jury understands these chats.
10 We're entitled to do that. That's classic expert testimony, for
11 him to explain the context --

12 THE COURT: You're not entitled to do it until it's
13 relevant. Look, I'm going to do this. I'm going to take a
14 brief recess. Ms. Ginsberg will give you a little prep on me.
15 But you better address what I'm asking. I want to know the
16 relevance of it. All right.

17 I'll take a brief recess, 15 minutes.

18 (Recess taken at 12:08 p.m.)

19 THE COURT: Before we continue, Mr. Jeffress, let me
20 correct myself. I misspoke. I said there were no
21 African-Americans in, what was it, the 10 or 12 who had
22 responded "yes." Two of the 12, one of them is Asian and the
23 other one is a person who identified herself as of mixed race.
24 So the extent I said they're all white, I was wrong.

25 MR. JEFFRESS: Thank you, Your Honor.

1 THE COURT: All right. Now, you-all submitted a
2 Rule 12 -- or a 16(b)(1) notice, and you've already, I think
3 appropriately, conceded that you're not going to ask this person
4 for opinions about his mental health, autism, or anything else.

5 MR. JEFFRESS: Correct, Your Honor.

6 THE COURT: And I think I understand what you say is
7 you want to -- well, let me hear what you say. I need to focus
8 sharply on what it is and why you think it's relevant. Because,
9 as you know, consent by these juveniles is not relevant and will
10 not be permitted.

11 MR. JEFFRESS: Yes, Your Honor. I think there are
12 really two things I would say, Your Honor. The first is, is
13 that there's a lot of terminology and so forth that's used
14 during these chat communications that is particular to the BDSM
15 practice. There are words that are used -- I mean, it would be
16 like when the Government calls a drug expert to come explain how
17 drug dealers talk to each other, which is usually admitted and
18 the Government often does.

19 Here, it's sort of the converse because it's the
20 defense that wants to put it on. But basically there are words
21 that are being used that are used typically in BDSM practice
22 that the jury needs to have it explained what they mean.

23 THE COURT: Like what?

24 MR. JEFFRESS: Well, I mean, the big one for us is the
25 term "boy" used in this context - and I think it's very clear -

1 does not connote age. It connotes the submissive part, a
2 submissive component of the dominant/submissive relationship,
3 but it's not being used for age.

4 So, for instance, the Government is going to put on an
5 ad that Mr. Sanders put out that this is how he met these
6 people, where the term "boy" is used, but boy is used in this
7 community not to say this is under age, in that sense of the
8 term "boy," but in the sense of, this is going to be the
9 submissive part of this. So I think that kind of terminology
10 needs to be explained.

11 THE COURT: All right. And are you also telling me
12 that you contest -- because the Government has to prove to the
13 jury that these are juveniles, that these are under age people.
14 And I take it you-all contest that?

15 MR. JEFFRESS: We don't contest. We've seen the birth
16 certificates. I think there are various issues that I'm still
17 unclear about, about how the Government is going to prove that.
18 But the point is, is the issue is Mr. Sanders' knowledge and
19 Mr. Sanders' intent, and when he is using the term "boy," he is
20 not asking for --

21 THE COURT: Well, yes, but it doesn't matter
22 what Mr. Sanders -- he might have thought they were 25-year-old
23 people. It doesn't matter. If they're juveniles, the defendant
24 is charged with knowing.

25 MR. JEFFRESS: Yeah. Well, we've submitted our

1 argument that we believe age is an element of the -- knowledge
2 of age by Mr. Sanders is an element of the offense.

3 THE COURT: Well, tell me a little bit more about that.

4 MR. JEFFRESS: Yeah, Your Honor, we think the
5 Government has to prove that Mr. Sanders knew that the minors
6 were in fact minors, and that he intentionally sought to produce
7 a visual depiction or to have sexual activity for the purpose of
8 producing a visual depiction by a minor. Now, if he thought he
9 was talking to another consenting adult, we do not believe that
10 that is illegal conduct, and that is not within the statute's
11 ambit.

12 THE COURT: All right. Go on.

13 MR. JEFFRESS: So here, I think it's important for the
14 jury to understand, when Mr. Sanders is using the term "boy" in
15 his advertisements or in anything else, he is not seeking an
16 underage person, he is just seeking the submissive partner. So
17 that's one explanation for how the terminology that Dr. Berlin
18 will explain from this area will be relevant and very helpful to
19 the defense for the jury to understand.

20 Now, the second thing -- and, Your Honor, there are
21 other examples. That was --

22 THE COURT: Do you expect he will say anything about
23 consent?

24 MR. JEFFRESS: No. Now, Your Honor, I think --
25 Dr. Berlin will not say that. Now, what he will say, though, I

1 think, is -- his testimony will be relevant in explaining the
2 sort of dynamic of basically: I'm ordering you to do something,
3 you're doing it. It looks from the outside like coercion, which
4 is one of the words that is included in the statute; but in
5 fact, in the context of this dynamic, there's already sort of
6 buy-in to these rules. I mean, it's like they're playing a
7 game, right, and that they already know that they're not being
8 coerced to do anything, they're being -- you know, this is part
9 of the agreed-upon conduct that they're engaging in.

10 And the statute says that Mr. Sanders has to have
11 coerced, used, persuaded, enticed them to create this visual
12 depiction of sexual conduct. We're going to oppose many aspects
13 of those elements, including that this is even sexually explicit
14 conduct. That's something that we will say it's not, and it
15 will be up to the jury to decide. But, more importantly, I
16 think, is that Mr. Sanders was not acting with the intent to
17 persuade, entice, coerce. They're having a conversation over
18 this BDSM platform, if you will, where they're already agreed
19 upon about this is how we're going to talk to each other. So
20 what maybe looks like coercion from the outside is not.

21 And I think we're entitled to show that it's less
22 likely that Mr. Sanders actually violated the statute once one
23 understands this BDSM dynamic. The BDSM dynamic, Your Honor, is
24 going to be a subject of, I think, a lot of testimony during the
25 Government's case.

1 THE COURT: Why?

2 MR. JEFFRESS: Because there's no question, and even
3 they agree, that that is what's going on in these chats --

4 THE COURT: Do you have to keep -- you know, you say,
5 "even they agree." One of the reasons I took a recess is
6 because it didn't seem to me that you had read their brief.
7 They don't agree with a lot that you're saying.

8 MR. JEFFRESS: I think they will agree that the
9 responses that he received to his ad were over a BDSM platform
10 and this was a BDSM practice. Now they say it's still illegal
11 because these are minors we're talking about.

12 THE COURT: And they can't consent.

13 MR. JEFFRESS: Right. That's what the Government's
14 position certainly will be.

15 THE COURT: And that's the law.

16 MR. JEFFRESS: Well, I mean, the statute still says
17 that Mr. Sanders has to have the intent to entice, coerce, use,
18 or persuade. That's for the production statute. Those are the
19 operative verbs.

20 THE COURT: That's correct.

21 MR. JEFFRESS: And they have to prove that about him.
22 And if he thinks in his mind, oh, this is already what we've
23 already agreed to, this is the rules of this game that we're
24 playing, that everyone plays for fun, then it makes it less
25 likely that he was acting with the intent to coerce, Your Honor.

1 And that's what the gist of our defense will be.

2 THE COURT: You keep using the word "coerce," and that
3 isn't something that the Government has to prove.

4 MR. JEFFRESS: Well, it is in the statute, Your Honor.

5 THE COURT: No.

6 MR. JEFFRESS: Yes.

7 THE COURT: It's entice or coerce. Or. It's in the
8 disjunctive. They don't have to prove coercion.

9 MR. JEFFRESS: That's right. There are four different
10 verbs, and they --

11 THE COURT: I'm glad you agree.

12 MR. JEFFRESS: I do agree with that, Your Honor. But
13 coerce is one of the things -- they've charged Mr. Sanders under
14 coercion.

15 THE COURT: Well, they charged him under the statute --

16 MR. JEFFRESS: Correct.

17 THE COURT: -- and it's typical to do it all. But
18 they're not required to prove coercion.

19 MR. JEFFRESS: They can prove one of the other ones.
20 They have to prove one of the verbs.

21 THE COURT: They aren't required to prove coercion, are
22 they?

23 MR. JEFFRESS: They could prove -- well, one of four --

24 THE COURT: I'm sorry, are they required to prove
25 coercion?

1 MR. JEFFRESS: No, not necessarily.

2 THE COURT: All right. What do you mean by "not
3 necessarily"?

4 MR. JEFFRESS: They could prove one of the other verbs.

5 THE COURT: All right. So they're not required to
6 prove coercion. They can prove one of the other ones.

7 MR. JEFFRESS: Right. They have to prove one of the
8 verbs.

9 THE COURT: Yes. All right. I think I understand now
10 what you mean. Do you want to tell me anything else about what
11 you want to use Dr. Berlin for, other than to define or explain
12 the significance of these terms in the chats?

13 MR. JEFFRESS: I think, Your Honor, in light of
14 Your Honor's rulings and everything like that, that would be the
15 subject area, which is the first one that we noticed that we
16 would be presenting him on.

17 THE COURT: Mr. Schlessinger, are you responding?

18 MR. SCHLESSINGER: Yes, Your Honor. Your Honor, I
19 think in the Court's colloquy with defense counsel, it's evident
20 the Court has already seized on the most significant fundamental
21 flaws with Dr. Berlin's proposed expert testimony. And there
22 are numerous flaws, but I think most fundamental is the utter
23 irrelevance of the entirety of his proposed testimony.

24 The defense proposes that Dr. Berlin will testify about
25 BDSM practices, what that means, and whether Mr. Sanders'

1 conduct, as will be shown to the jury through the evidence,
2 falls within this understanding of BDSM. It does not matter
3 whether Mr. Sanders was acting consistently or inconsistently
4 with the precepts of BDSM, as Dr. Berlin proposes to explain
5 them.

6 Supposing that --

7 THE COURT: Well, the statute says, "uses, persuades,
8 induces, entices, or coerces." I take it you would say, if
9 these juveniles -- well, it says, "employs, uses, persuades,
10 induces." So he could use or employ a minor to engage in lewd
11 and lascivious conduct, and that would be covered by the
12 statute.

13 MR. SCHLESSINGER: That's absolutely right. And
14 there's nothing that Dr. Berlin purports -- or that defense
15 purports to have Dr. Berlin testify about that has anything to
16 do with that one way or another.

17 When the defendant sent to a minor child, "You are to
18 record a video, you will show me your entire body, state your
19 full name," that is or is not production of child pornography -
20 it is, in fact - but there's no relevance whether this could be
21 considered, as defense suggests, part of BDSM or consistent with
22 BDSM. It makes no difference whatsoever.

23 Supposing further that it's not consistent with BDSM,
24 but the purported testimony is that Mr. Sanders believed it was
25 consistent with BDSM, it's equally irrelevant. It makes no

1 difference when or whether, when Mr. Sanders was producing child
2 pornography, that he thought that it was consistent with BDSM or
3 some other sexual attitude or subculture. It's totally --

4 THE COURT: Does Mr. Sanders have to know that they
5 were juveniles, under age?

6 MR. SCHLESSINGER: No, he does not. And for that
7 reason, the specific proposed relevant purpose of Dr. Berlin, to
8 explain terminology, including the meaning of the term "boy," is
9 irrelevant. It is not required. And, in fact, this court has
10 already ruled in this case, in granting the Government's motion
11 in limine, to preclude any mistake of age defense, that it's not
12 relevant. It doesn't matter, for purposes of the production
13 statute --

14 THE COURT: I think the law is fairly clear on that.
15 But in the argument that I just heard, the defendant wants to
16 argue that the Government must prove beyond a reasonable doubt
17 that Mr. Sanders knew they were under age. What's your view
18 again on that?

19 MR. SCHLESSINGER: This court has already recognized
20 and rejected that argument in granting the Government's motion
21 in limine to preclude any mistake of age defense. This court --

22 THE COURT: But you would agree, wouldn't you, that the
23 Government has the burden to prove that they were in fact
24 juveniles?

25 MR. SCHLESSINGER: Yes, Your Honor. Yes, we do.

1 Absolutely. And we do have that burden. We do not have any
2 burden -- there's no requirement to show that Mr. Sanders knew
3 they were juveniles. And in this court's order of May 20th of
4 this year, on docket entry 364 at page 6, the Court recognized
5 as much, citing the Fourth Circuit's precedential decision in
6 *United States vs. Malloy*, 568 F.3d 166, a 2009 decision.

7 Equally irrelevant is the defense suggestion that
8 Dr. Berlin will testify about the buy-in or the dynamic, to use
9 two words that defense counsel chose. It is irrelevant what the
10 dynamic was, or whether there was, quote, buy-in by the minors.
11 Because as this court has already aptly noted, minors cannot
12 consent to this conduct. And indeed, the Court has already, in
13 the very same order, granted the Government's motion in limine
14 to preclude any defense evidence suggesting that the minors
15 could have possibly consented in some way, noting that there is
16 no consent defense. For that reason, any purported testimony of
17 Dr. Berlin that the minors bought into it or there was a dynamic
18 where they were agreeable to it in some way is just totally
19 legally irrelevant, and can serve no function for the jury.

20 Finally, Your Honor, defense counsel suggested that --
21 near the end of his argument that Dr. Berlin is going to testify
22 that Mr. Sanders was not acting with any particular -- with the
23 requisite intent. He was not acting with the intent to produce
24 a visual depiction when he communicated with the minors and said
25 things like "you're going to record a video and send it to me."

1 The problem with that is that it runs directly afoul of
2 Rule 704(b). Rule 704(b) expressly precludes an expert witness
3 from offering an opinion about whether a defendant did or did
4 not have a mental state that's an element of the crime. And
5 when defense counsel proposes that Dr. Berlin will testify that
6 Mr. Sanders did not have the requisite purpose, that is exactly
7 what he's proposing to have Dr. Berlin testify to, and it's
8 flatly contrary to Rule 704(b).

9 Just as the Court ruled that Dr. Whitney's proposed
10 testimony was inadmissible and would have violated Rule 704(b),
11 to the extent that Dr. Whitney would have testified about a
12 mental state that's an element of the offense, so too
13 Dr. Berlin's testimony, to that extent, is inadmissible pursuant
14 to Rule 704(b).

15 For that reason, because Dr. Berlin's testimony is
16 entirely irrelevant, and it should be excluded.

17 THE COURT: All right. Mr. Jeffress -- by the way,
18 what does your mask say on it?

19 MR. JEFFRESS: It says "D.C. Health Link, Get Covered,
20 Stay Covered."

21 THE COURT: Well, that's fine. But for the trial, see
22 if you can wear something that has nothing on it.

23 MR. JEFFRESS: Absolutely, Your Honor.

24 THE COURT: One never knows what something like that
25 might evoke from a juror. Go ahead, Mr. Jeffress.

1 MR. JEFFRESS: Your Honor, first of all, the last thing
2 that Mr. Schlessinger said, we do not intend on having
3 Dr. Berlin opine specifically on Mr. Sanders' intent. We
4 recognize that's not proper expert testimony, and that's not
5 what he's going to do. He's just going to give background facts
6 on BDSM from which we can argue about to the jury, and will need
7 in order to make our arguments to the jury that Mr. Sanders did
8 not have the requisite intent, and that also he wasn't acting
9 for the purpose of producing a visual depiction of sexual
10 conduct.

11 Now, I know the Court has already written about
12 *McCauley* and *Palomino Coronado*, but we think, Your Honor, that
13 one issue that we can argue here is, Mr. Sanders' purpose, if
14 you look at some of these chats, at least, he's not asking for
15 sexually explicit conduct. He's asking for a naked photo or
16 he's asking for a photo that has them doing something that's in
17 the nature of BDSM, but he's really not asking for sexually
18 explicit conduct. And he wasn't acting for the purpose of
19 producing a video. There's no evidence that he ever distributed
20 the videos to anybody else, there's no evidence that he ever
21 watched the videos again.

22 THE COURT: The evidence is that he demanded the
23 videos.

24 MR. JEFFRESS: Demanded the video to confirm that they
25 were doing what they were supposed to be doing in the context of

1 this BDSM game. So we just need those rules explained.

2 Dr. Berlin is not going to say that. But that is part of our
3 defense, is that the purpose of what he's asking this for is
4 he's just trying to see that they did what he said, which is
5 sort of the power dynamic here, like I order you to do
6 something --

7 THE COURT: Are you also saying that what he asked them
8 to do was not sexually explicit?

9 MR. JEFFRESS: Some of it is not.

10 THE COURT: But some of it is.

11 MR. JEFFRESS: I don't know, Your Honor. I have my
12 witnesses. What I have seen, when he asked for a full live body
13 pic, I don't regard that as sexually explicit conduct, and I
14 don't think it is under *Dost* --

15 THE COURT: Do you have children?

16 MR. JEFFRESS: I do, actually, yes.

17 THE COURT: Never mind that.

18 MR. JEFFRESS: But just a naked photo of a child, a lot
19 of parents have that, and I think Congress very specifically --

20 THE COURT: Really?

21 MR. JEFFRESS: Yeah, like in the bathtub or something
22 like that. Yeah, I think a lot of parents have that. I think
23 Congress very specifically and the courts very specifically have
24 endeavored not to criminalize that. And that's why it has to be
25 lascivious.

1 THE COURT: All right. Well, I think your point that
2 it's a jury issue is somewhat well taken. I'll think about
3 that.

4 MR. JEFFRESS: Thank you, Your Honor. I think after
5 the Government's case, it will be even more clear why this needs
6 to be part of the defense.

7 THE COURT: All right. I think that last point that
8 you've just made is the one that I find most moving at this
9 time. I'm going to do this. I'm going to issue an order that
10 grants the Government's motion to exclude the testimony
11 because -- of his, on everything but what you've talked about.
12 I'll make it explicit in the order. And I'll defer that until
13 the conclusion of the Government's case. Maybe I will know more
14 at that time.

15 But it's very clear that there can be no evidence from
16 this purported expert about autism, about his mental health
17 condition, about his purpose under 704 as to why, in his
18 opinion, he did things. This doctor says he's a nice person; I
19 don't have any doubt about his being a nice person. But there
20 won't be any testimony about that. And there won't be any
21 testimony about consent, that they did it all consensually.
22 Because that is legally irrelevant, and any evidence offered in
23 that regard would be unfairly prejudicial and confusing to the
24 jury.

25 The law says -- and I think, Mr. Jeffress, and I'll ask

1 you, but I think the law is fairly clear that he doesn't have to
2 know that they are juveniles. Indeed, a mistake of age defense
3 does not apply. So the Government doesn't have to prove that
4 Mr. Sanders knew they were under age. They do -- the Government
5 does have to prove beyond a reasonable doubt that they were in
6 fact -- these so-called victims were in fact under age. And
7 they can do that just by a picture.

8 Indeed, in this last case Mr. Schlessinger tried, they
9 relied very heavily on that, because there were literally
10 hundreds of them and there was no way to identify who they were,
11 nor any way to identify when the pictures were taken. But it
12 was clear to anybody that these were small children; in some
13 cases babies and in some cases teenagers. But they were all
14 under age, and the jury had no trouble concluding what.

15 As far as your issue about the standard, of course, as
16 you know, I have written some about the standard. In the
17 *McCauley* case I used the wrong standard, and I was reversed for
18 that. And I accept and understand that. I was wrong, and I
19 should have anticipated that. It wasn't that difficult. I
20 don't remember now my exact feeling, but I should have seen that
21 one.

22 However, as you know, I have had a subsequent case in
23 which I have construed the statute in accordance with existing
24 Fourth Circuit precedent to be a motivating factor; that is, a
25 motivating, not the predominant, not the principal one, as you

1 argue. You'll have a chance to argue that anew. Maybe there
2 will be some new law between now and then. But at the moment
3 I'm not persuaded that it has to be more than a motivating
4 factor.

5 But anyway, I'll deal with that in this order.

6 MR. JEFFRESS: Thank you, Your Honor.

7 THE COURT: And again, of course, maybe I'm wrong
8 again. But this is the wrong court to persuade me.

9 MR. JEFFRESS: Your Honor, on mistake of age, I know
10 that's not exactly sort of what we were dealing with, but I
11 think it's very different now. *Excitement Video* actually said
12 for possession and receipt counts, they do have to prove
13 defendant's knowledge of age.

14 THE COURT: Oh, tell me that again. I didn't follow
15 you.

16 MR. JEFFRESS: The Supreme Court in *Excitement Video*
17 said that they do have to prove --

18 THE COURT: In which case?

19 MR. JEFFRESS: *Excitement Video*.

20 THE COURT: What's the cite on that? And was that a
21 2252 conviction?

22 MR. JEFFRESS: I think that case is included in both
23 their jury instructions and in ours, Your Honor, referred to and
24 cited. But I don't have the cite right in front of me.

25 THE COURT: And what do you contend that case holds?

1 MR. JEFFRESS: For possession or for receipt charges,
2 which Mr. Sanders is charged with, the Government -- the jury
3 does have to find that Mr. Sanders understood that material to
4 be -- yeah, here it is, Your Honor. 513 U.S. 64, and it's from
5 1994. But the Government does have to prove that knowingly
6 meant knowingly that it was -- that the minors were under age.

7 THE COURT: All right.

8 MR. JEFFRESS: Okay. Now, production, they argue
9 there's a different rule for production. But there should not
10 be a different rule for production. The reason why there's a
11 different --

12 THE COURT: That you should address up the road here at
13 that building --

14 MR. JEFFRESS: Yes, I just want to make sure our
15 objection is noted, Your Honor. We've already litigated this
16 issue and already said that.

17 THE COURT: All right. But I'm glad to have your
18 reminding me of that, because we had that in your case as well,
19 Mr. Schlessinger. They had to know, in the receipt and the
20 possession case, that they were minors. It was a little easier
21 for you to show because of the obviousness of the pictures. But
22 I think Mr. Jeffress is right, that for possession, it has to be
23 knowing. Is that right, Mr. Schlessinger?

24 MR. SCHLESSINGER: That is right, Your Honor. And
25 perhaps it will be helpful to note for the Court that the

1 possession count in this case pertains to child pornography that
2 is not the same child pornography that was produced with these
3 minor victims, but other child pornography, much of which
4 involves victims of similar age to those in the last case; that
5 is to say, very young victims.

6 THE COURT: All right.

7 MR. JEFFRESS: The receipt count, though, Your Honor,
8 does include material from older -- you know, the same victims
9 that are discussed in the production counts.

10 THE COURT: Does that also include others?

11 MR. JEFFRESS: I believe it does.

12 THE COURT: Well, I'll have to make all that clear in
13 instructions to the jury.

14 All right. This is helpful.

15 MR. JEFFRESS: Thank you, Your Honor.

16 THE COURT: Now, Mr. Schlessinger, you have a lot of
17 evidence that you wish to admit from computers or telephones.
18 Right?

19 MR. SCHLESSINGER: Yes, we do, Your Honor.

20 THE COURT: All right. Well, you need to be sure --
21 are there any stipulations about admissibility?

22 MR. SCHLESSINGER: We've proposed a stipulation. I
23 don't believe we've received a response from defense.

24 THE COURT: They're not required to stipulate anything.
25 So you need to be prepared to dot every "I" and cross every "T,"

1 because I don't want to have to take time, in the course of the
2 trial, to hear objections that could have been obviated. So I
3 think you can assume that every objection that can be made will
4 be made.

5 MR. SCHLESSINGER: Yes, Your Honor.

6 THE COURT: All right. Anything else at this time?
7 Just a moment.

8 Mr. Schlessinger, I understand that you have requested
9 that these monitors be turned off. Is that to preserve the
10 privacy of the minor victims?

11 MR. SCHLESSINGER: Yes, Your Honor. Because unlike in
12 the last case, we're not only going to have child pornography
13 exhibits in the case, but we're also going to have exhibits that
14 contain information identifying minor victims. And for that
15 reason --

16 THE COURT: Like birth certificates?

17 MR. SCHLESSINGER: Yes.

18 THE COURT: How do the birth certificates come in?

19 MR. SCHLESSINGER: They're self-authenticating and
20 there's a special hearsay exception for records of births and
21 deaths, I believe.

22 THE COURT: And have you made that information known to
23 Ms. Ginsberg?

24 MR. SCHLESSINGER: Yes.

25 MS. GINSBERG: Judge, I think that was a subject of a

1 prior motion. And the Government has -- as I reread the
2 transcript, the Government, um, acknowledges that it is going to
3 have to produce a witness who can connect the name in the birth
4 certificate with the person who is the victim in this case. A
5 birth certificate that's self-authenticating is not relevant for
6 any purpose unless it's connected -- unless it can be connected
7 to the victims.

8 THE COURT: All right.

9 MS. GINSBERG: So whether they do it through parents or
10 someone else who has seen and met with the victim, um, we don't
11 know how they're going to do that. But we don't agree that --
12 we think that has to happen. That's part of what would make it
13 admissible.

14 THE COURT: All right. Mr. Schlessinger, what's your
15 response to that? Are you prepared to cover that?

16 MR. SCHLESSINGER: Yes, Your Honor. There will be --
17 that will be covered in the fashion envisioned by defense
18 counsel for four out of the five charged minor victims, and
19 there is a fifth charged minor victim as to which we anticipate
20 resting on the evidence that's going to be presented as to the
21 devices; that it is a real minor and it is a person under the
22 age of 18. And we think it will be evident from that.

23 THE COURT: So for the birth certificates, what are you
24 going to present?

25 MR. SCHLESSINGER: For the birth certificates, we

1 intend to introduce the birth certificates --

2 THE COURT: Right. But she says it's not relevant
3 unless it's tied to a particular victim. The name won't be
4 enough, apparently.

5 MR. SCHLESSINGER: Right. And I think for four of the
6 five victims, the testimony of the type that Ms. Ginsberg
7 anticipated will be presented during the trial.

8 THE COURT: All right. Anything else on behalf of the
9 Government that I need to cover in this matter, Mr. Prabhu?

10 MR. PRABHU: Yes, Your Honor. An issue related to one
11 of our witnesses has been raised with us, and we felt that we
12 needed to present it to the Court.

13 The mother of one of the minor victims has been
14 receiving contact from the defense, which obviously they're
15 entitled to do, but she has informed the Government that she
16 told them that she did not want to expose her child to any
17 questioning by the defense, and that they should stop calling.
18 She has complained to us that the calls keep coming, that they
19 come from different numbers, different people. She's had to
20 block numbers because of continued, what she views as
21 harassment.

22 We don't have any independent knowledge of that, but
23 this is what our minor victim's mother has told us.

24 THE COURT: Is she going to be a witness?

25 MR. PRABHU: She is not. Her son is. And the

1 additional issue there is that she is feeling harassed, and
2 she's not the witness, she's the mother of the witness.

3 But she had two conversations, apparently, with a
4 member of the defense, and in one of them she was told that it
5 was in the child's interest to meet with the defense because
6 they were going to come very hard at him when he is testifying.
7 I just refer the Court to the previous discussion about consent
8 and circumstances and the age of the minor. Those are the
9 things that they would likely be asking him about, and that's
10 inappropriate.

11 But the fundamental point is, she, independently of
12 us -- we certainly did not encourage her not to meet with the
13 defense, but she has made that decision, and would like it on
14 the record that she's refused that contact, and she believes
15 what she terms as harassment should stop.

16 MS. GINSBERG: Judge, I would like to address that.
17 Because I was on both of those calls, among other people. We
18 spoke with this witness' mother, we explained who we were, that
19 we were asking her permission to speak with her son. We had a
20 conversation that was very short; she said that she didn't think
21 it was in his interest, she would think about it, and we asked
22 her if we could call her back and ask her again. And she said
23 that we could, that she would speak with her son's therapist,
24 see if it was advisable.

25 We did call her back a second time; she told us at the

1 very beginning of that call that she has been told that she does
2 not and her son do not have to speak with us.

3 THE COURT: That's true.

4 MS. GINSBERG: Of course it's true. I assume that she
5 meant - and I may be wrong - but that she was told by the
6 Government or someone on the Government's behalf that they did
7 not have to speak with us. And we said that's right.

8 We asked her if she would reconsider; she said no. The
9 call was very short. She almost hung up on us. But there was
10 never --

11 THE COURT: I don't see anything for the Court to do,
12 Mr. Prabhu or Ms. Ginsberg.

13 MS. GINSBERG: I don't either. But if she felt
14 harassed, she may have because she is very protective of her
15 son. But I want to assure the Court that we were extremely
16 careful, we had a witness who is not a lawyer --

17 THE COURT: All right. I don't doubt that,
18 Ms. Ginsberg.

19 MS. GINSBERG: Thank you.

20 THE COURT: But I also -- you can understand how she
21 might see things differently.

22 MS. GINSBERG: Of course.

23 THE COURT: But I'm glad to have your statement about
24 what happened. I'm sure you would never harass a person like
25 that, so I don't feel that there's any need for the Court to do

1 anything.

2 Do you, Mr. Prabhu?

3 MR. PRABHU: No, Your Honor. I brought it to the
4 Court's attention at the request of the victim's mother. And I
5 felt we had a duty to do that.

6 THE COURT: All right. Right. And the most you ought
7 to tell her is that it was brought to my attention. That's the
8 end of it. I don't plan to do anything further.

9 Anything else on behalf of the Government today?

10 MR. SCHLESSINGER: No, Your Honor.

11 THE COURT: Anything else on behalf of the defendant
12 today?

13 MS. GINSBERG: One thing. Your Honor asked me to
14 remind you about the problem that we have of anticipating who
15 can be prepared to cross-examine a given agent who is going to
16 offer testimony about these victims' chats. The chats for some
17 of these victims are as long as a thousand pages. The
18 Government is not intending to offer a thousand pages, but there
19 are portions of those chats that we believe are relevant and
20 admissible --

21 THE COURT: In fact, the Government has already filed
22 their exhibits, have they not?

23 MS. GINSBERG: They have.

24 THE COURT: So you know.

25 MS. GINSBERG: But, Your Honor, we are not bound by the

1 Government's exhibits. And I think the cases -- um, the
2 defendant has the right to put context around these statements,
3 and *Palomino* is very clear that just the fact of taking a
4 picture of a minor, or in this case, because the minor took the
5 picture himself, basically asking them to do that is not enough
6 to convict. That there is context that the defendant's intent,
7 in requesting the taking of the picture --

8 THE COURT: What does that have to do with what you're
9 asking me -- are you asking the Court to tell the Government
10 that they have to tell you now which witness is going to do
11 which --

12 MS. GINSBERG: Judge, I wish I was asking that, because
13 I'm going to ask something that's probably going to irritate the
14 Court more. But I am asking the Court to allow -- if the
15 Government elects to have one witness testify about victims that
16 have been -- that different lawyers have prepared for, to allow
17 different lawyers to cross-examine on those particular victims.

18 THE COURT: It doesn't irritate me, but I'm not going
19 to do it.

20 MS. GINSBERG: Judge, I will say, and respectfully,
21 that I don't think under those circumstances I can be effective,
22 because I cannot personally prepare to cross-examine --

23 THE COURT: Well, that's your problem.

24 MS. GINSBERG: -- all of -- well, it will be
25 Mr. Sanders' problem.

1 THE COURT: Yes. I'm not going to do it any other way.
2 It's just not necessary. Your client wants to talk to you.

3 MS. GINSBERG: Your Honor, what we're essentially
4 asking is to allow one attorney per victim, to cross-examine per
5 victim.

6 THE COURT: All right. That might be a better way to
7 do it. You should listen to your client more often.

8 MS. GINSBERG: I should. I think he thinks I should
9 listen to him more often than I do.

10 THE COURT: Well, he may be right.

11 MS. GINSBERG: He may be. But that is what I was
12 trying to say. Because the Government may introduce its
13 evidence about more than one victim through the same witness, we
14 would like to be able to have a lawyer -- one lawyer
15 cross-examine per victim. And if that means that the Government
16 is having an agent who is testifying about two victims, that it
17 could be that one lawyer, one victim --

18 THE COURT: What is it that's cross-examining an FBI
19 agent about a victim?

20 MS. GINSBERG: Maybe I...Your Honor, there are five
21 victims for the production charges.

22 THE COURT: Yes.

23 MS. GINSBERG: Only two of them are going to be in
24 court.

25 THE COURT: All right.

1 MS. GINSBERG: It is our assumption --

2 THE COURT: But with respect to the others who are not
3 going to be in court, what does an FBI agent know that isn't on
4 the -- isn't in the exchanges and the chats?

5 MS. GINSBERG: Well, it's through the FBI agent that
6 the Government will put on those chats. And these agents have
7 reviewed the entire body of the chats. I mean, they've taken
8 out certain portions, but these agents extracted these chats,
9 they are familiar with the content of these chats, some of which
10 are longer than a thousand pages --

11 THE COURT: They're not going to introduce a thousand
12 pages. You keep arguing, well, we have the right to add other
13 material to show context. And you do. And I'll consider that.
14 I haven't heard anything that requires the Government to put on
15 a single -- I told you you should listen to him --

16 MS. GINSBERG: I know. But he's pointing to the entire
17 hard drive.

18 THE COURT: I won't castigate you for interrupting me
19 and doing it. Go ahead. What do you want to say?

20 MS. GINSBERG: What I want to say is that the
21 Government is introducing the entire chats. They may elicit
22 testimony about a smaller volume of those chats.

23 Out of the greater volume, we are entitled to question
24 the agent who has knowledge of these chats about other portions
25 of the chats as they relate to Mister --

1 THE COURT: All he knows or all she knows is what the
2 chat says.

3 MS. GINSBERG: That's right. But we need to be able to
4 pick from among those chats the relevant portions that we would
5 use to cross-examine them, to put the chats the Government has
6 selected into context and to --

7 THE COURT: What can an FBI say about context?

8 MS. GINSBERG: He can say yes -- judge, we have to have
9 a witness from whom we can elicit these other chats. The other
10 chats put the Government's chats into context.

11 THE COURT: All you have to do is designate those other
12 chats, and then you can argue that they're necessary for
13 context. The Government will then be heard and I'll make a
14 ruling. And if they come in, they come in. But I don't see
15 what an agent has to do with it.

16 MS. GINSBERG: Well, judge, wouldn't they come in
17 through the agent? Otherwise, if we did what Your Honor is
18 suggesting, the Government could just give the jury a transcript
19 of the chats they want, we could give the jury transcripts. I
20 mean, that's not how I envision the trial occurring.

21 I think the Government is going to ask the agents
22 whether they extracted these chats, whether they're familiar
23 with them, whether they're accurate, and then have them, through
24 the agent, put up on the monitors, and either have the agent
25 read them out loud or have the jury read them while the agent is

1 on the stand.

2 And we ought to be able to do that with respect to
3 other portions of the chats so that the jury -- I did not
4 envision just designating portions of chats and giving it to the
5 jury in the jury room. We have to have a witness --

6 THE COURT: Mr. Schlessinger, what's your view on how
7 to deal with this? She says she can't prepare for all of this.

8 MR. SCHLESSINGER: Your Honor, the chats that defense
9 counsel has alluded to were provided to defense counsel in
10 discovery over one year ago.

11 If Your Honor recalls, the last case that Your Honor
12 tried last week, there were multiple chats in that case, and
13 there was a single defense counsel who was able to cross-examine
14 a testifying FBI agent --

15 THE COURT: It wasn't even a law firm. It was one
16 lawyer.

17 MR. SCHLESSINGER: That's correct, Your Honor.

18 THE COURT: He did a pretty good job. In fact, he won
19 an acquittal on one of the three counts.

20 MR. SCHLESSINGER: He did an outstanding job,
21 Your Honor.

22 THE COURT: How long are these chats that you intend to
23 offer?

24 MR. SCHLESSINGER: They vary widely. Some of them are
25 quite short, in the tens of pages; some of them are hundreds of

1 pages.

2 THE COURT: Why would you need a chat that's hundreds
3 of pages long?

4 MR. SCHLESSINGER: We do not. And we didn't intend to
5 read to the jury, publish, or otherwise dwell on hundreds of
6 pages. It was our idea, our thought to at least admit the
7 entire chats, quite honestly, simply to inoculate ourselves
8 against any charge of hiding the ball or providing less than
9 full context.

10 So it was our thought to admit them, certainly without
11 publishing all of them or even the majority of the very long
12 ones, but only the certain portions that are relevant to the
13 charges. And I think defense counsel will be fully able to
14 cross-examine the witness about any chats that are --

15 THE COURT: The defense counsel can't do anything other
16 than elicit from the agent what the other portions of the chats
17 say that are admitted for context or for completeness. Right?
18 I mean, the agent can't do anything but read -- how is it that
19 you're going to put on what you want? The agent would read it?

20 MR. SCHLESSINGER: That's your intention, Your Honor,
21 yes. Again, only small portions.

22 THE COURT: I think I have a solution to this, but it
23 isn't going to be multiple lawyers, Ms. Ginsberg. But let me
24 see if I can deal with this.

25 (OFF THE RECORD.)

1 THE COURT: I'll tell you in a moment how I intend to
2 deal with this problem.

3 Yes?

4 MR. SIRKIN: Your Honor, there is one thing I would
5 like to point out to the Court. The indication that merely the
6 person may have been under the age of 18 and they could not have
7 consented, there are other statutory provisions in the U.S. Code
8 that say the age of consent is 16. And there are very many
9 variations throughout the country of the age of consent for
10 engaging in voluntary --

11 THE COURT: I'm only interested in federal statutes.

12 MR. SIRKIN: Well, the federal statutes, the
13 transporting across state lines for the purpose of sexual
14 activity and so forth, is 16. And there are perhaps other
15 provisions in the federal code that provide that the age of
16 consent is 16.

17 THE COURT: Now, I'm fine with your telling me the
18 this. And you're Mr. Sirkin. I'm glad that you have told me
19 this. It's useful. But it violates my rule that only one
20 lawyer can stand up.

21 MR. SIRKIN: I understand that. I understand that.

22 THE COURT: I'm not going to chastise you for that
23 because we're beginning this.

24 Anything else you want to tell me, Mr. Sirkin?

25 MR. SIRKIN: No, Your Honor.

1 THE COURT: Is there anything -- let me go back to you,
2 Mr. Schlessinger. You haven't addressed in any pleading that
3 I've read, because I don't think you're on notice, that they
4 intend to rely on statutes other than what might be -- well, let
5 me ask you this. What do you intend to rely on in order for me
6 to instruct the jury that what does minor mean?

7 MR. SCHLESSINGER: Section 2256. I don't recall the
8 precise subsection, but it defines all the terms for Chapter 110
9 of the U.S. Code, and defines minor as being a person under the
10 age of 18 years. It does not matter that other statutes
11 prohibit conduct solely with respect to people under 16.

12 THE COURT: All right. I don't have before me,
13 Mr. Sirkin, right now any issue that makes me choose between
14 what you've said and what Mr. Schlessinger has said. But at
15 least you both know what positions you may take. I think it's
16 pretty significant that the specific chapter in the code has its
17 own decision about what's a minor.

18 Did you want to offer anything else, Mr. Sirkin? I
19 take it you need to confer. In this court, when you need to
20 confer, you ask for permission to do so.

21 MR. SIRKIN: I was just indicated, I think in
22 *Ashcroft vs. Free Speech*, the Court talked about the age of
23 consent in the New York statute was 16. I know the Court had
24 indicated you're only interested in federal law, but I think
25 there's another case in which the U.S. Code, in a recent case

1 of -- it appears at 137 Supreme Court 1562, where they mention
2 that the act of sexual abuse of a minor is 16.

3 THE COURT: All right. But you understand that this
4 statute of the code has its own definition of a minor. What's
5 your response to that?

6 MR. SIRKIN: It's what the statute says. I can't
7 disagree with that.

8 THE COURT: Am I not bound by what that statute says?

9 MR. SIRKIN: Well, we think that there's some dispute
10 with that, but that's for another day.

11 THE COURT: Well, I wouldn't be optimistic about that
12 other day, in view of the fact that this particular statute has
13 its own definition.

14 MR. SIRKIN: Consistent -- as I say, I think it's
15 something that we will in the future argue. Perhaps not in this
16 case, but on appeal or in other cases.

17 THE COURT: All right. Well, you can bring it to my
18 attention and the reasons for it; otherwise, an appellate court
19 will say you didn't raise it.

20 MR. SIRKIN: Specifically, the age of consent is
21 different than the age of a minor.

22 THE COURT: All right. I understand that.

23 Mr. Schlessinger, do you want to respond to that?

24 MR. SCHLESSINGER: The only definition we're concerned
25 with is the definition of minor as defined -- for purposes of

1 Chapter 110 of the U.S. Code, all of the crimes with which
2 defendant is charged are violations of Chapter 110 of the
3 United States Code; and Section 2256, which is in Chapter 110,
4 specifically Subparagraph 1, says: "For the purposes of this
5 chapter, the term 'minor' means any person under the age of
6 18 years."

7 THE COURT: All right. But then we go to the law on
8 when consent is relevant or irrelevant. And he's saying that,
9 okay, so a minor is a person under the age of 18, and Mr. Sirkin
10 knows he doesn't have any traction to argue against that. But
11 he says that the age of consent is different from the definition
12 of a minor.

13 MR. SCHLESSINGER: The crimes with which Mr. Sanders
14 are charged do not reference any age of consent. There's no --
15 it does not matter what the age of consent is in any federal --

16 THE COURT: If they're minors, they can't consent.
17 That's your view?

18 MR. SCHLESSINGER: Our view is that minor is
19 statutorily defined as a person under the age of 18 years for
20 all of the crimes with which Mr. Sanders is charged.

21 THE COURT: Yes, but you didn't listened to what I
22 said. I threw you a softball and you muddled it.

23 So consent, in your view, is defined by the statute --
24 or not defined by the statute. But consent, in your view, does
25 not apply to a person under the age of 18?

1 MR. SCHLESSINGER: Yes, that is right.

2 THE COURT: All right. I understand that.

3 Last, Mr. Sirkin?

4 MR. SIRKIN: It is our position that if the child is of
5 the age of consent, then there's been no underlying crime
6 committed that was filmed because they were able to consent to
7 the sexual activity that was engaged in. And therefore, to film
8 or record a lawful act, just a lawful act being transmitted,
9 cannot constitute a crime under the Fifth Amendment.

10 THE COURT: All right. Thank you, I understand that
11 argument.

12 All right. Court will stand in recess. We'll take up
13 the --

14 MS. GINSBERG: Judge, were you going to give us
15 whatever decision you had about how we cross-examine that I
16 wasn't going to be happy with?

17 THE COURT: Yes. I'm not going to allow different
18 lawyers to do it. I'm going to consider - I may put something
19 in an order - how you may resolve it, but I don't see it as a
20 problem, Ms. Ginsberg. You've told me that you consider it a
21 very significant problem. I don't.

22 MS. GINSBERG: I understand.

23 THE COURT: And I may not see it fully, but it seems to
24 me you've had these materials for years; you ought to be able to
25 tell me -- maybe I'll consider, Mr. Schlessinger, you don't

1 really intend to offer all of these chats or all portions of it,
2 just smaller portions of it. Right?

3 MR. SCHLESSINGER: We did intend to offer the entirety
4 of them, but simply to show the jury a small portion of them.

5 THE COURT: So Ms. Ginsberg already knows what chats
6 you want to offer?

7 MR. SCHLESSINGER: Yes.

8 THE COURT: So she already knows or has the ability to
9 decide how much in addition to that she thinks should be
10 admitted for purposes of completeness. Right?

11 MR. SCHLESSINGER: Yes.

12 THE COURT: Ms. Ginsberg, you already know that.

13 MS. GINSBERG: I do know that. Well, again, until we
14 hear which portions the Government is going to present to the
15 jury, it's very difficult to anticipate exactly which other
16 portions we want to use.

17 This would never be a problem if the individual victims
18 were all testifying, because we could divide up victim by
19 victim. That's the situation we're in, Your Honor.

20 THE COURT: Okay. I'm not going to rule on that today.
21 I don't see any need to require the Government to parcel it out
22 or for you to have separate lawyers do it. But I'll think about
23 it some more, and if I can conceive of how to do it.

24 But it seems clear that the Government has already told
25 you what statements it wants to argue -- or admit. I take it,

1 though, Mr. Schlessinger, you haven't told them precisely what
2 parts you want to elicit from the witness?

3 MR. SCHLESSINGER: We have. Because they're separated
4 out as separate exhibits, access to which defense has already
5 been granted.

6 THE COURT: And does the defense know which agent is
7 going to testify to which victim?

8 MR. SCHLESSINGER: That I do not -- no, I do not think
9 they do.

10 THE COURT: All right. Nor do I think it would make
11 any difference to the defendant. Because all he's going to do
12 is be able to read it. Right?

13 MR. SCHLESSINGER: That's right.

14 THE COURT: Last chance, Ms. Ginsberg.

15 MS. GINSBERG: It would make a difference if we knew.
16 And --

17 THE COURT: I'm not going to require that.

18 MS. GINSBERG: Well, Your Honor, what we may have to do
19 is call these agents as our own witnesses. And I was just
20 trying to avoid having to do that.

21 THE COURT: That's something you have the ability to
22 do.

23 MS. GINSBERG: Thank you.

24 THE COURT: Anything further from the Government?

25 MR. SCHLESSINGER: No, Your Honor.

1 THE COURT: Anything further from you, Ms. Ginsberg?

2 MS. GINSBERG: No.

3 THE COURT: All right. I'm going to take a 30-minute
4 recess. I'll reconvene at 10 minutes to 2:00 and take up first
5 the Gant matter.

6 (Off the record at 1:20 p.m.).

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CERTIFICATE OF OFFICIAL COURT REPORTER

18

19 I, Rebecca Stonestreet, certify that the foregoing is a
20 correct transcript from the record of proceedings in the
21 above-entitled matter.

22

23

24 ____//Rebecca Stonestreet____

____12/14/21____

25

SIGNATURE OF COURT REPORTER

DATE